

WEST DUNBARTONSHIRE COUNCIL

Report by the Executive Director of Corporate Services

Council : 25 February 2009

Subject: Appeals Committee – 14 August 2008

1. Purpose

1.1 On 13 January 2009 a Requisitioned Meeting of the Council instructed Officers to submit an independent report to a Full Council Meeting no later than the February Meeting on:

- i) Why, despite repeated attempts by the Acting Chair of the Committee, it has take over four months and this Motion to get the Committee decision fully implemented?
- ii) Why the report requested with regards to actions taken by the Executive Director of Social Work and Health has not been forthcoming?

1.2 Brodies Solicitors were instructed to produce the independent report, which is attached hereto.

2. Background

2.1 The background is that on 14 August 2008 the Appeals Committee considered a grievance by Peter O'Neill. The Committee upheld the appeal, and agreed that the Chief Executive should investigate discrimination against the Appellant and the failure of the Executive Director of Social Work and Health to investigate fully accusations of bullying and harassment.

2.2 Following approaches from Mr O'Neill's representative, the Acting Chair of the Committee requested that the decision was clarified. A clarification letter, the terms of which were checked with the Acting Chair, was sent to the Appellant on 18 August 2008. Following further approaches by the Appellant's representative, the Acting Chair requested that further changes were made to the decision letter. The Chief Executive and Head of Legal Administrative and Regulatory Services advised the Acting Chair that in their opinion it was improper to make any further changes and no further changes were made.

2.3 As regards the investigation by the Chief Executive of the Executive Director of Social Work which was sought by the Appeals Committee, reasons for the delay in providing this were detailed in the report to the Special Council Meeting of 13 January 2009, but are further explored in the report from Brodies.

2.4 The background is covered in greater depth in the report from Brodies.

3. Main Issues

3.1 Brodies note that the question posed by the first part of the motion is not straightforward. Insofar as it related to the steps which the Appeals Committee require to be taken then (with the exception of the report into the actions taken by the Executive Director of Social Work and Health) these matters had been attended to well before the Council Meeting was requisitioned. The remaining issues raised by the first part of the motion were confirmed to Brodies by Councillor R McColl as being:-

- The letters that were issued by the Appeals Committee Clerk do not fully reflect the decision arrived at by the Appeals Panel on 14 August 2008.
- The fact that officer's had not addressed this perceived shortcoming is a failure on the part of those officers to fully implement the decision of the Panel. Brodies comment that this issue focuses on the question of why a third letter was not issued to the Appellant. (paragraph 6.3 and 6.5 of the report).

3.2 In relation to the first part of the investigation, as to why it has taken 4 months and a Council resolution to get the decision implemented, the key finding are:-

"In our view Mr Ettles letter provides an accurate account of what was decided by the Committee and of what was announced by Councillor McColl at the end of the meeting. It would, in our view, have been possible for Mr Ettles to provide more in the way of detail, but Mr Ettles has made it clear that this would not have been in accordance with normal practice at the Council. Of the two Council procedures (grievance procedure and disciplinary procedure) it is only the latter that provides any guidance on what is expected in terms of the record of the decision of the Panel. The wording of the disciplinary procedure, although not the same as the wording of the grievance procedure, does tend to suggest that detailed decisions are ordinarily only required in situations where the Panel reaches the conclusion that an appeal has only been partially upheld. This accords with Mr Ettles' view that he was acting in accordance with custom and practice and we are satisfied that this was indeed the case".
(7.2)

"We are of the view that, in the absence of a detailed account of the Panel's decision, the precise nature of the decision is provable by reference to the grounds of appeal that are listed in the Appellant's grievance form. This is not a difficult or onerous process. The wording of Mr Ettles original letter may not have met with the approval of Mr Morrison and it may not have been worded to the absolute satisfaction of the Chair of the Panel (who was not any more detailed in his verbal account of the decision than Mr Ettles was in his written account of the decision) but it is none-the-less an accurate record of the Panel decision. We therefore find it impossible to support the view that, in so far as

the implementation of the Panel decision required the issue of a decision letter that reflected the findings of the Panel, neither Mr Ettles nor any other officer of the Council has failed to implement that part of the Panel decision". (4.13)

"We have concluded that the letter by Mr Ettles, that is the letter issued on 15 August 2008 gave an accurate account of the decision of the Appeal Panel as announced by the Chair of the Panel at the conclusion of the Hearing held on 14 August. We are also satisfied that the letter written by Mr Ettles was written in accordance with custom and practice. Mr Morrison and the Chair of the Panel may have preferred the letter was reworded, but in our view, the changes that were being proposed were more a matter of style than of substance" (13.1)

3.3 Paragraphs 9.3 to 9.6 deal with the question of whether officers were justified in refusing to issue a third version of the decision letter. The key sections are:-

"However it is clear from the statements given by both officers (the Chief Executive and the Head of Legal Administrative and Regulatory Services) that they believed that what Councillor McColl was asking for amounted to a request that the decision of the Panel was amended. In our view the officers appear to have been acting in good faith and it seems appropriate therefore that as a precautionary measure they decided not to issue a further letter". (9.4).

"Decision letters emanating from the Appeals Panel serve much the same purpose as the minutes of Panel meetings in that they record the outcome of such meetings. It is therefore understandable why Senior Council Officers would be concerned that a decision letter might be subsequently altered to reflect the preferred wording of either side to an appeal. Doing business in this way, no matter how well intentioned, may well give rise to suggestions of partiality or unfair treatment. Whilst we are not suggesting partiality or unfair treatment in the present case, we share the concerns of the Chief Executive and the Head of Legal Administrative and Regulatory Services. In matters such as this it is important not only that parties are treated fairly, but that they are seen to be treated fairly". (9.5)

"As with Council/Committee minutes, the appropriate forum in which to raise the accuracy of the decision letter appears to us to be the Appeals Panel. We appreciate that Councillor R McColl has strong views of the wording of the decision letter but these views are not necessarily the views of the Appeals Panel. They are the views of a single member of that Panel, albeit on this occasion they are the views of the Panel Chair. In the circumstances it is, in our view, understandable why the Chief Executive and the Head of Legal Administrative and Regulatory Services did not issue a further version of the decision letter. It is unclear, however, whether either side had given consideration as to how the impasse might be resolved". (9.6)

3.4 In relation to the second part of the investigation as to why the report requested with regards to actions taken by the Executive Director of Social Work and Health has not been forthcoming, the key findings are: -

“There has been a delay in taking forward the investigation that was called for by the Appeals Panel. Whilst this is regrettable, not the least because the investigation is concerned with matters of some importance, that some delay would result as a consequence of the absence of the Chief Executive was inevitable. Additionally Ms O’Neill had hoped to involve ACAS in the investigation and some time lapsed before this option was eventually discounted. The delay was not, however significant in the context of the significant issues that were being handed by Human Resources in the latter part of 2008 the delay was not unreasonable. The investigation is now in hand and ought to be completed by the end of March.” (13.3)

3.5 Recommendations from the Brodies report as detailed in section 8 and 14 of their report are as follows:-

- If the Clerk is unable to amend the letter, because what is complained of is of some considerable importance, common sense dictates that the matter must be referred back to the Panel in order that there can be absolute clarity as to the intended outcome of the hearing. It is in our view unfortunate that this did not happen as it would have ensured that the terms of the letter were reviewed by the elected members who decided the appeal. Both sides to the appeal would then be entitled to address the committee on the terms of the decision letter (8.5 and 8.6)
- The differences between the Council’s Grievance Procedures and Disciplinary Procedures highlighted in this report are unnecessary and unhelpful and it would assist officers and members alike if they were to be better aligned.
- The Chief Executive should ensure that the investigation required by the Appeals Panel is completed as soon as possible and in any event before the end of March 2009. (14.1.1)
- The changes to the Grievance Procedures approved by the Council should be implemented immediately. The Procedures should be updated and reissued by the end of March. The Council should adopt similar changes to its Disciplinary Procedures. (14.1.3)
- The Council should require (not request) that all members who sit on the Appeals Panel undertake training on the processes and procedures with which the Panel must comply. (14.1.4) The background to this is contained in paragraphs 10.4 and 10.5 of the report.
- Officers likely to be involved in advising or appearing before the Appeals Panel should undertake refresher training. The training should also be extended to relevant officers in Human Resources. The training should

cover the remit of the Panel, in particular the range of decisions that are within the competence of the Panel. (14.1.5)

- The Council should consider HR support to the Appeals Panel in addition to legal support. This may assist the panel achieve a better understanding of the practical (as opposed to legal) implications of their decisions. (14.1.6)

4. Personnel Issues

- 4.1 It should be noted that in terms of the Councillors Code of Conduct, as incorporated into paragraph 5.4 of the Council's Member/ Officer Protocol that Councillors should not raise matters relating to the conduct or capability of employees in public.

5. Financial Implications

- 5.1 The changes sought to the Appeals Committee decision letter include a finding that the Council had breached the employee's contract of employment. This issue was not considered by the Appeals Committee and the actions taken by the Appeals Committee would themselves form part of any decision whether the Council had breached a contract of employment. Inclusion of such a finding in this or any other case could expose the Council to an action of constructive dismissal and damages. The report suggests in 10.5 that the apparent willingness of members to make a finding on this matter without the issue being raised in the course of the hearing suggest that it might be wise to conduct a review of the training needs of members. In 14.1.4 they recommend that all members who sit on the Appeals Committee should be required to undertake training on the processes and procedures with which the Panel must comply.

6. Risk Analysis

- 6.1 The risks to the Council depending on how it deals with this report are:-
- Risk of prejudicing the fair hearing of any disciplinary hearing, the grievance by the Appellant's agent and any subsequent employment tribunal hearing.
 - Financial risk to the Council as detailed above.
 - With Audit Scotland follow-up visit underway, risk of undermining the improvement progress (including improvement in Member/Officer relations) that the Council has achieved.
 - Reputational damage.

7. Conclusions

7.1 Council is asked to note the contents of the independent report from Brodies Solicitors following the Council resolution on 13 January 2009.

8. Recommendations

8.1 It is recommended that Council notes the contents of the report from Brodies Solicitors, and agrees to their recommendations as detailed in paragraph 3.5 of this report.

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Appendices: Brodies Report

Background Papers: Special Council Meeting, 13 January 2009 – Appeals Committee 14 August 2008 – Requisition Motion

Wards Affected: ALL